No. 89-884

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

BYRON DANIEL CRAWFORD, M.D.,
Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD,
Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division One

PETITIONER'S REPLY BRIEF

* ROBIN B. JOHANSEN
JOSEPH REMCHO
MARTIN BUCHANAN
REMCHO, JOHANSEN & PURCELL
220 Montgomery Street, #800
San Francisco, California 94104
Telephone: 415/398-6230

EDWARD M. ROSENFELD
DONALD G. NORRIS
PATTERSON, BELKNAP, WEBB & TYLER
1875 Century Park East, #950
Los Angeles, California 90067
Telephone: 213/557-1000

Counsel for Petitioner
* *Counsel of Record*

January 9, 1990

BOYANE OF SAN FRANCISCO INC. • 190 NINTH ST. • S.F. CA 94103 • (415) 864 2300

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Cases

Constitutions

Statutes

Miscellaneous

No. 89-884

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

BYRON DANIEL CRAWFORD, M.D.,
Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD,
Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division One

PETITIONER'S REPLY BRIEF

INTRODUCTION

Pursuant to Supreme Court Rule 22.5, petitioner Byron Crawford hereby submits this reply brief in support of his petition for writ of certiorari. This reply brief addresses only the following two issues raised for the first time in the WCAB's opposition brief: (1) the timeliness of the petition; and (2) whether petitioner properly raised the federal due process issue in the state courts.

ARGUMENT

I. THE PETITION WAS TIMELY FILED BECAUSE PETITIONER IS NOT SEEKING REVIEW OF A JUDGMENT IN A CRIMINAL CASE

The WCAB argues that if the contempt proceedings against Dr. Crawford are criminal in nature for purposes of deciding the federal due process claim, then the 60-day time limit for filing a writ of certiorari from a "judgment in a criminal case" must apply. Supreme Court Rule 20.1. This argument conveniently ignores the fact that petitioner is not in fact seeking review of a final judgment in his criminal contempt case, but rather seeks review of the judgment denying his civil petition for writ of prohibition and/or mandate to prohibit the Board from proceeding to trial. This writ proceeding is a separate and independent civil action that was brought by petitioner as an original proceeding in the California Court of Appeal pursuant to California Code of Civil Procedure sections 1084 *et seq.* and 1102 *et seq.* It is therefore subject to the 90-day time limit for filing a petition for writ of certiorari in civil cases. 28 U.S.C. § 2101(c).

The mere fact that the civil writ proceeding involves an underlying criminal action does not mean that the 60-day time limit for criminal cases is applicable. This Court has held, for example, that the 90-day time limit for *civil* actions applies to both a petition for writ of habeas corpus and a motion to vacate, set aside, or correct a criminal sentence under 28 U.S.C. section 2255. *Heflin v. United States,* 358 U.S. 415, 418 n.7 (1959). The Court reasoned that such a proceeding "is not a proceeding in the original criminal prosecution but an independent civil suit." *Ibid.* This logic applies with even greater force to the civil writ proceeding at issue here.

In any event, even if petitioner were seeking review of a final judgment in his criminal contempt prosecution, the 90-day time limit for civil cases would apply. 28 U.S.C. § 2101(c). Though criminal in nature, this proceeding was initiated by an Order to Show Cause issued by the WCAB under California Code of Civil Procedure sections 1208 *et seq.* It was not initiated by a grand jury indictment, it is not being prosecuted by a district attorney, and

the contempt is not being charged under the separate criminal statute contained in California Penal Code section 166. Thus, this is not a "criminal case" within the meaning of Supreme Court Rule 20.1.[1]

II. PETITIONER PROPERLY RAISED THE FEDERAL DUE PROCESS ISSUE IN THE STATE COURTS

The WCAB concedes that "petitioner did raise a due process issue in the state contempt proceedings." Respondent's Brief in Opposition at 6. However, the Board contends that the federal issue was not properly preserved because petitioner did not specifically assert a federal, as opposed to a state, due process claim. *Ibid.* This assertion is incorrect both as a matter of law and fact.

It is well settled that Supreme Court jurisdiction over state court cases that raise issues of federal law "does not depend on citation to book and verse." *Eddings v. Oklahoma,* 455 U.S. 104, 113-14 n.9 (1982).

> No particular form of words or phrases is essential, but only that the [federal] claim . . . be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately preserved.
>
> *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928).

---

[1] Even if the court concludes that Supreme Court Rule 20.1 does apply here, petitioner respectfully requests that the 60-day time limit be extended by 30 days, as expressly permitted by the rule. *See also Schacht v. United States,* 398 U.S. 58, 63-64 (1970) (holding that the time limit for criminal cases is "not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require"). Petioner filed this petition in the good faith belief that the 90-day statutory time limit of 28 U.S.C. section 2101(c) applied to this civil writ petition.

In *Taylor v. Illinois*, 484 U.S. 400, 108 S. Ct. 646 (1988), this Court held that the petitioner had properly preserved his Sixth Amendment compulsory process claim even though his initial appeal to the Illinois appellate court had not expressly asserted such a claim. The Court relied upon the fact that the petitioner had "cited and relied upon, through a quotation from an Illinois Appellate Court decision, two of our Compulsory Process Clause cases." *Id.* at 651 n.9. Based upon "the authority cited by petitioner and the manner in which the fundamental right at issue has been described and understood by the Illinois courts," the Court found it "appropriate to conclude that the constitutional question was sufficiently well presented to the state courts to support our jurisdiction." *Ibid.*[2]

The reasoning of *Taylor v. Illinois* is directly applicable here. Although petitioner never *expressly* indicated whether he was relying upon the federal or the state due process clause, or upon both, the record taken as a whole makes it clear that the federal issue was raised.[3] In one of his Court of Appeal briefs, for example, immediately after referring to "the constitutional guarantee of due process of law," petitioner quoted the following passage from this Court's *federal* due process decision in *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926):

---

[2] In other decisions, this Court has assumed jurisdiction based upon even more vague allusions to a federal constitutional issue in the state courts. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980); *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978).

[3] The Court of Appeal also did not specify whether its decision was based upon the federal or state due process clause or both. *See* Appendix A to Petition for Writ of Certiorari, at A-12. For the reasons stated in the text below, it is reasonable to conclude that the Court of Appeal intended to resolve both the federal and state due process issues. *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith, supra*, 449 U.S. at 159 n.5 (holding that even though it was unclear whether a federal constitutional issue had been raised, and the Supreme Court of Florida had not mentioned the federal Constitution in its opinion, "[w]e are satisfied that the Supreme Court of Florida upheld the statute against both federal and state constitutional challenges").

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.
>
> (Quoted in Petition for Rehearing and/or Modification of Opinion at 23).[4]

In his second petition for review by the California Supreme Court, petitioner again relied upon a federal Supreme Court decision to illustrate the proposition that "fundamental notions of due process" require warning "'of what the law intends to do if a certain line is passed.'" Petitioner's Reply to Answer to Petition for Review at 6 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). He also specifically cited both the federal and state constitutional provisions against ex post facto laws by way of analogy to his due process claim. *Id.* at 6 n.3 (citing U.S. Const., art. I, section 9(3); Cal. Const., art. I, section 9).

In the same brief, petitioner cited another California Supreme Court decision that also expressly invoked *federal* due process principles. Id. at 6-7 (citing *People v. Weidert*, 39 Cal.3d 836, 218

---

[4] Although *Connally* was cited for the first time in the petition for rehearing, this Court has held that a federal issue is properly preserved even if raised for the first time in a petition for rehearing unless the state has a "strictly or regularly followed" rule against it. *Hathorn v. Lovorn*, 457 U.S. 255, 262-65 (1982). As the leading commentator on California law has recognized, the California rule against raising new issues in a petition for rehearing "may be relaxed for good cause" and "is sometimes disregarded without any stated reason." B. Witkin, 9 *California Procedure*, Appeal, § 684 at p.657 (3d ed. 1985) (citing California cases). Moreover, the rule does not apply to jurisdictional issues, which may be raised at any time. *Unruh v. Truck Insurance Exchange*, 7 Cal.3d 616, 622, 102 Cal.Rptr. 815, 498 P.2d 1063 (1972); *Sime v. Malouf*, 95 Cal.App.2d 82, 116, 212, P.2d 946 (1949). Whether particular acts constitute contempt is considered a jurisdictional issue in California. *In re Ciraolo*, 70 Cal.2d 389, 394, 74 Cal.Rptr. 865, 450 P.2d 241 (1969); *In re Baroldi*, 189 Cal.App.3d 101, 108, 234 Cal.Rptr. 286 (1987); *In re Stanley*, 114 Cal.App.3d 588, 591, 170 Cal.Rptr. 755 (1981); *Mowrer v. Superior Court*, 3 Cal.App.3d 223, 229, 83 Cal.Rptr. 125 (1969).

Cal.Rptr. 57, 705 P.2d 380 (1985)). In *Weidert*, the court held that due process principles of fair notice prohibit a retroactive judicial enlargement of a criminal statute. Drawing an analogy to the state and federal constitutional provisions against ex post facto laws, the court declared:

> Although by their terms, the ex post facto clauses apply only to legislative acts, both this court and the United States Supreme Court have incorporated the principle upon which the prohibition rests into the due process clauses of the state *and federal* Constitutions.
>
> *Id.* at 850 (emphasis added) (citing *Marks v. United States*, 430 U.S. 188, 191-92 (1977); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Keeler v. Superior Court*, 2 Cal.3d 619, 634, 87 Cal.Rptr. 481, 470 P.2d 617 (1970)).

Even if petitioner had not expressly cited these federal due process cases, however, his federal claim would still have been adequately preserved because of the "manner in which the fundamental right at issue has been described and understood by the [California] courts. . . ." *Taylor v. Illinois, supra*, 108 S. Ct. at 651 n.9. In analyzing the "fair warning" requirement of the state due process clause, California courts have routinely applied federal due process precedents. Indeed, the leading California Supreme Court case on the issue relied almost exclusively upon the federal due process decisions of this Court, simply declaring that "[t]he law of California is in full accord." *Keeler v. Superior Court, supra*, 2 Cal.3d at 634. Other California "fair warning" decisions have also relied upon federal due process principles and cases. *See, e.g., People v. Weidert, supra*, 39 Cal.3d at 849-50; *Burg v. Municipal Court*, 35 Cal.3d 257, 269-70, 198 Cal.Rptr. 145, 673 P.2d 732 (1983); *People v. Superior Court (Hartway)*, 19 Cal.3d 338, 345, 138 Cal.Rptr. 66, 562 P.2d 1315 (1977), *cert. denied & appeal dismissed*, 466 U.S. 967 (1984); *In re Baert*, 205 Cal.App.3d 514, 517-22, 252 Cal.Rptr. 418 (1988), *cert. denied*, 109 S. Ct. 3242 (1989); *Clingenpeel v. Municipal Court*, 108 Cal.App.3d 394, 397-98, 166 Cal.Rptr. 573 (1980).

In light of the fact that California courts simply apply federal due process law in analyzing "fair warning" cases under the state

Constitution, petitioner's reliance upon general principles of "due process" in the state courts was sufficient to apprise the state courts of his federal claim. When combined with the explicit citations to federal due process authorities, the unmistakable conclusion is that the federal claim was properly presented and preserved for review by this Court.[5]

Even if the federal issue had not been properly presented, however, the current trend is to view the rule "as merely a prudential restriction that does not pose an insuperable bar to our review." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645, 1651 (1988). In this case, where the substance of petitioner's federal claim was clearly before the state courts, the claim should not be barred by the prudential rules of this Court.

---

[5] None of the cases cited by the WCAB involved explicit citations to federal due process cases, and none arose in an area of the law where the state courts simply applied federal due process law in analyzing state due process claims. *See* cases cited in Respondent's Brief in Opposition at 5-6.

CONCLUSION

The petition for writ of certiorari was timely, and the federal issue was properly raised and preserved in the state courts. The WCAB's attempt to erect technical barriers to review where none exist should be rejected, and certiorari should be granted to address the federal due process issue on its merits.

January 9, 1990

Respectfully submitted,

ROBIN B. JOHANSEN
JOSEPH REMCHO
MARTIN BUCHANAN
REMCHO, JOHANSEN & PURCELL
220 Montgomery Street, #800
San Francisco, California 94104
Telephone: 415/398-6230

EDWARD M. ROSENFELD
DONALD G. NORRIS
PATTERSON, BELKNAP, WEBB & TYLER
1875 Century Park East, #950
Los Angeles, California 90067
Telephone: 213/557-1000
Counsel for Petitioner